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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 740.

JULIA C. GELFERT, as Sole Surviving Executor of the Last Will and Testament of James J. Carpenter, Deceased,

Petitioner,

—against—

THE NATIONAL CITY BANK OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BARNEY B. FENSTERSTOCK,
Solicitor for Respondent.

HARRY ZALKIN,
Of Counsel.

THE COURT PRESS, N. Y. C.

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—against—

THE NATIONAL CITY BANK OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Summary Statement of Matter Involved.

On December 29, 1932 James J. Carpenter, to secure his guaranty of the payment of commercial loans made and to be made by respondent to Hammond & Carpenter Corporation, executed and delivered to said respondent a mortgage covering certain property in the County of Kings, City of New York (R. 20).

Upon the non-payment of certain of such loans made in 1937, this action to foreclose said mortgage was brought against, among others, Julia C. Gelfert (the petitioner herein) and George U. Hammond, as Executors of the Last Will and Testament of said James J. Carpenter, then deceased. Each of said executors appeared by separate counsel (R. 6). On

November 15, 1938 judgment of foreclosure and sale was duly entered fixing the amount due to respondent upon said mortgage at $18,401.25 (R. 5). The foreclosure sale was held on December 16, 1938 and the property was purchased by respondent's nominee for $4,000 (R. 11). The appellate courts below found that this price was not shockingly inadequate and that no likelihood of a greater realization on a resale had been shown (257 App. Div. at 467; 284 N. Y. at 14).

On January 23, 1939 respondent moved to confirm the Referee's report of sale and for a deficiency judgment against the Estate of James J. Carpenter in the amount shown by said report, to wit: the sum of $16,162.12 (R. 5-6).

The petitioner, as one of the executors, defaulted on said motion.

George U. Hammond, the other executor, made a cross-motion as such co-executor "for an order fixing the real value of the premises foreclosed for the purposes of deficiency judgment proceedings upon the ground that it would be inequitable and unconscionable to permit the plaintiff herein to enter a deficiency judgment * * * upon the ground that the sale price was wholly inequitable and unconscionable * * *" (R. 19-20).

The Supreme Court of the State of New York, Kings County, without opinion, granted respondent's motion, confirmed the referee's report of sale, directed a deficiency judgment as shown by that report, and denied Hammond's cross-motion (R. 27, 3-4).

On Hammond's appeal to the Appellate Division of said Supreme Court, the aforesaid order was modified by striking therefrom the provisions for a deficiency judgment and as so modified was affirmed (R. 29-30), the Court holding that the amendment to Section

1083 of the N. Y. Civil Practice Act which became effective April 7, 1938 (hereinafter called the "new Section 1083") was applicable to the case at bar and that respondent had made no application for a deficiency judgment thereunder (R. 31-37).

On respondent's appeal to the Court of Appeals of the State of New York, the determination of the Appellate Division was reversed and that of the Supreme Court, Kings County was reinstated (R. 37-38).

While the aforesaid appeal was pending in the Court of Appeals, Hammond died and after the remittitur from said Court of Appeals had been filed, an order was entered by the Supreme Court, Kings County amending the caption of this action by eliminating the name of said Hammond and showing the petitioner as the "sole surviving executor of the Last Will and Testament of James J. Carpenter, Deceased" (R. 40).

Reasons for Denial of Writ.

This Honorable Court, in the exercise of its discretion, should deny the petition for certiorari for the following reasons:

1. The petitioner, having defaulted on the motion which resulted in the order and judgment sought to be appealed from, has no standing to apply for certiorari.

2. No substantial federal question is presented for review because

(a) in holding that respondent was entitled, as a matter of contractual right, to a deficiency judgment

for the difference between the mortgage debt and the proceeds of the foreclosure sale, the Court of Appeals followed and applied the long established law of the State of New York; and

(b) in holding that the new Section 1083 materially changed respondent's right to such deficiency judgment and thus impaired the obligations of its contract, in contravention of Article 1, Section 10 of the Federal Constitution, the decision of the Court of Appeals is in accord with the applicable decisions of this Honorable Court.

Argument.

POINT I.

The petitioner has no right of appeal from the order and judgment at bar.

The order and judgment which this application seeks to review confirmed the referee's report of sale and directed the entry of a deficiency judgment in the amount shown by said report. On respondent's motion for that relief, the petitioner defaulted. In neither of the subsequent appeals therefrom was the petitioner a party, appellant or respondent. Said petitioner, therefore, has no right to appeal from said order and judgment, and accordingly no standing to apply for certiorari.

New York Civil Practice Act, Section 557.

The fact that George U. Hammond, a co-executor, represented by separate counsel who now appear for petitioner, opposed the aforesaid motion and partici-

pated in the appeals therefrom does not vest in petitioner any right of appeal from an order and judgment duly entered upon her deliberate default. Hammond's death does not transfer to petitioner as surviving executrix any right of appeal which Hammond might have had if he had continued as an executor.

POINT II.

No substantial federal question is presented for review.

The Court of Appeals has held in the case at bar that when the mortgage was executed on December 29th, 1932 and thereafter in 1937 when the monies secured thereby were advanced by respondent, the statutory system of foreclosure in New York, as judicially interpreted, provided that liability for a deficiency was finally determined by the judgment of foreclosure and sale, the subsequent docketing of a deficiency judgment being a merely clerical act; and that the measure of such deficiency judgment was the residue of the debt remaining unsatisfied after a sale of the mortgaged property and the application of the proceeds pursuant to the directions of the judgment of foreclosure and sale (N. Y. Civ. Prac. Act, former Section 1083; *Morris* v. *Morange*, 38 N. Y. 172; *Marshall* v. *Davies*, 78 N. Y. 414, 422; *Wager* v. *Link*, 134 N. Y. 122; *Feiber Realty Corp.* v. *Abel*, 265 N. Y. 94; *Emigrant Industrial Savings Bank* v. *Van Bokkelen*, 269 N. Y. 110).

Under principles long settled by decisions of this Honorable Court, the method of enforcement thus

provided became part of the contract of the parties (*Bronson* v. *Kinzie,* 1 How. (U. S.) 311; *Farmers Bank* v. *Federal Reserve Bank,* 262 U. S. 649, 660) and could not constitutionally be changed, in any material respect, by subsequent legislation, at least unless a remedy substantially coextensive therewith remained after the subsequent legislation or was furnished thereby (*Edwards* v. *Kearzey,* 96 U. S. 595; *Clark* v. *Reynolds,* 8 Wall. (U. S.) 318, 322; *Barnitz* v. *Beverly,* 163 U. S. 118, 122).

Preliminarily, it is to be noted that the new Section 1083 is neither emergency nor temporary legislation (*cf. Home Building & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398). It is a permanent statute applicable to foreclosures of all mortgages, regardless of date, amount or parties, and contains no provisions apposite to the relief of any pressing public needs (*cf. W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426). Concurrently with its enactment in 1938, the Legislature extended the operation of the New York moratory deficiency judgment act (N. Y. Civ. Prac. Act, Section 1083-a, which provides, in respect of mortgages dated prior to July 1st, 1932, a similar measure for deficiency judgments) until July 1st, 1939 (Laws of 1938, Chap. 501), and has subsequently further extended such operation to July 1st, 1941 (Laws of 1939, Chap. 607; Laws of 1940, Chap. 566, 567). In the light of these circumstances the Court of Appeals in the case at bar has found, as a fact, that the new Section 1083 is not addressed to the general welfare of the State but is directed solely to the private contractual rights of parties to an indebtedness secured by a mortgage on real property (*cf. Veix* v. *Sixth Ward Ass'n.,* 310 U. S. 32).

That the new Section 1083 makes material and substantial changes in the previously existing system of foreclosure, as the Court of Appeals has held herein, is undeniable. Applied to pre-existing contracts, its practical effect is to change the medium of payment agreed upon by the parties from lawful money of the United States to a parcel of real estate at a hypothetical market value which, by actual test, is not then realizable and which takes no account of the expense of maintaining the property until the time, if ever, when it may be realized. Its provisions neither require nor permit consideration of any equitable factors or of the relative circumstances of the parties but compel every mortgagee in every situation to bid in the property in foreclosure at a price at least equal to the valuation which may thereafter be fixed by the court or to forego satisfaction of so much of the mortgage debt as equals the difference between the value so fixed and a lower price bid on a sale to a third party.

Finally, the Court of Appeals has found in the case at bar that no remedy substantially equivalent to that taken away by the new Section 1083 remains to the mortgagee. The right to recover the mortgage debt at law, apart from the mortgage security, is circumscribed by a prohibition against levying execution on the mortgagor's equity of redemption (N. Y. Civ. Prac. Act, Section 710). Even upon the doubtful premise that the new Section 1083 can be construed not to have superseded Section 1078 of the Civil Practice Act, which permits, by leave of court, the maintenance of a second action, after foreclosure, to recover a deficiency, authoritative rulings of long standing have restricted the discretion of the court to grant such leave to cases where special circumstances are shown

manifestly requiring that relief (*Equitable Life Assurance Society* v. *Stevens,* 63 N. Y. 341; *Scofield* v. *Doscher,* 72 N. Y. 491; *Vanderbilt* v. *Schreyer,* 91 N. Y. 392; *Morrison* v. *Slater,* 128 App. Div. 467; *Darmstadt* v. *Manson,* 144 App. Div. 249; *Stehl* v. *Uris,* 210 App. Div. 444).

This Honorable Court has uniformly invalidated state statutes similar in purpose and effect to the new Section 1083 insofar as they were sought to be applied to contracts existing at the time of enactment.

Bronson v. *Kinzie,* 1 How. (U. S.) 311;
McCracken v. *Hayward,* 2 How. (U. S.) 608;
Gantly's Lessee v. *Ewing,* 3 How. (U. S.) 707;
Barnitz v. *Beverly,* 163 U. S. 118.

At the October, 1937 term, this Honorable Court denied certiorari in a case in which the Supreme Court of South Carolina had held unconstitutional a virtually identical statute.

Jefferies v. *Federal Land Bank,* 302 U. S. 708.

In recent years, numerous state courts of last resort have likewise voided similar statutes as applied retroactively.

Bontag v. *McCurdy,* 59 Pac. (2d) 326 (Ariz.);
Adams v. *Spillyards,* 61 S. W. (2d) 686 (Ark.);
Hales v. *Snowden,* 65 Pac. (2d) 847 (Cal.);
Atlantic Loan Co. v. *Peterson,* 181 Ga. 266;
Vanderbilt v. *Brunton Piano Co.,* 111 N. J. L. 596;

Federal Land Bank v. *Garrison,* 193 S. E. 308 (S. C.), cert. denied *sub nom. Jefferies* v. *Federal Land Bank, supra;*
Langever v. *Miller,* 76 S. W. (2) 1025 (Tex.).

The case of *Honeyman* v. *Jacobs,* 306 U. S. 539, with which petitioner claims the instant decision is in conflict, is plainly distinguishable therefrom. The statute under consideration in the *Honeyman* case (Section 1083-a of the New York Civil Practice Act) was moratory legislation, occasioned by a pressing public emergency legislatively declared, and was limited both in scope and duration. The vital distinctions between such an enactment and the permanent legislation here involved have heretofore been observed by this Honorable Court (*Worthen Co.* v. *Kavanaugh,* 295 U. S. 56; *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426). Insofar as the opinion of this Honorable Court in the *Honeyman* case may have indicated that the validity of the act there considered was sustainable, apart from the existent emergency, on the ground that it merely codified a power which courts of equity in New York had always possessed to control the measure of deficiency judgments in foreclosure actions, the Court of Appeals has pointed out in the case at bar that both historically (see *Frank* v. *Davis,* 135 N. Y. 275, 277-8) and under the unbroken current of Court of Appeals decisions (*Morris* v. *Morange,* 38 N. Y. 172; *Wager* v. *Link,* 134 N. Y. 122; *Frank* v. *Davis,* 135 N. Y. 275; *Feiber Realty Corp.* v. *Abel,* 265 N. Y. 94; *Emigrant Industrial Savings Bank* v. *Van Bokkelen,* 269 N. Y. 110; *Guaranteed Title & Mortgage Co.* v. *Scheffres,* 275 N. Y. 30) no such equitable jurisdiction in foreclosure suits ever existed in the State of New York. The Appellate Division decisions in *Monaghan* v. *May,* 242 App. Div.

64, and *Guaranteed Title & Mortgage Co.* v. *Scheffres,* 247 App. Div. 294, were both overruled by the Court of Appeals (*Emigrant Industrial Savings Bank* v. *Van Bokkelen,* 269 N. Y. 110; *Guaranteed Title & Mortgage Co.* v. *Scheffres,* 275 N. Y. 30). That this Honorable Court will accept, as controlling, the pronouncements of the Court of Appeals, the highest court of New York State, as to the local law, is settled (*Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 78; *Ruhlin* v. *N. Y. Life Ins. Co.,* 304 U. S. 202).

It should also be observed in connection with the *Honeyman* case that whereas in that case the value of the mortgaged property was found "without question" to be equal to the mortgage debt, no such concession is made in the case at bar and even the petitioner's evidence indicates the contrary (R. 22-24). In fact, the judgment sought to be reviewed herein is abundantly sustainable, entirely apart from constitutional issues, on the ground that the price at which the property was purchased at the foreclosure sale represents the fair market value thereof in any event (R. 25-27), and the decision of the Supreme Court, Kings County, may be so construed.

The case of *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.,* 300 U. S. 124, is not, as petitioner asserts, contrary to the instant decision, but is entirely reconcilable therewith. In the cited case, this Honorable Court held that a North Carolina statute, which applied only where the sale was by a trustee under a power of sale in the mortgage deed and only where the mortgagee was the purchaser at such sale, did not impair the obligation of contract because the remedy of strict foreclosure in equity which remained to the mortgagee was substantially co-

extensive with the remedy affected by the statute. The governing principle of this decision is unquestioned—its application, however, to the case at bar leads to the opposite result in view of the inequivalence and inadequacy of the remaining remedies afforded by the law of New York, as construed by its Court of Appeals.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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HARRY ZALKIN,
Of Counsel.